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7 **UNITED STATES DISTRICT COURT**
8 **SOUTHERN DISTRICT OF CALIFORNIA**
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10 ROBERT E. BATTLE,

11 Plaintiff,

12 vs.

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14
15 MICHAEL J. ASTRUE, Commissioner of
Social Security

16 Defendant.

17 CASE NO. 11-CV-829 WQH (WMc)

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19 **REPORT AND
RECOMMENDATION: (1) TO
GRANT IN PART PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT; (2) TO DENY
DEFENDANT'S CROSS-MOTION
FOR SUMMARY JUDGMENT;
AND (3) REMAND FOR FURTHER
PROCEEDINGS**

20 [ECF Nos. 12, 14]

21 **I.**

22 **INTRODUCTION**

23 This matter is before the Court on cross-motions for summary judgment. Plaintiff Robert E.
24 Battle II brings his motion under § 205(g) of the Social Security Act (“Act”), 42 U.S.C. § 405(g)¹,
25 seeking judicial review of the Commissioner of Social Security’s (“Commissioner”) final decision
26 denying his claim for Disability Insurance Benefits (“DIB”) under Title II of the Act. Plaintiff asks
27 the Court to grant his motion for summary judgment, reversing the Commissioner’s decision, which

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1 Plaintiff argues: (1) fails to properly discount Plaintiff's pain testimony; (2) fails to assign the proper
 2 weight to the opinions of Plaintiff's treating and examining physicians; (3) is not supported by
 3 substantial evidence at Step Four of the disability evaluation process. The Commissioner
 4 concurrently seeks summary judgment to affirm the ALJ's decision.

5 The Court finds the motions appropriate for submission on the papers and without oral
 6 argument pursuant to Local Rule 7.1(d)(1). After careful review of the moving and opposition papers,
 7 the administrative record, the facts, and the law, **the Court RECOMMENDS** Plaintiff's motion for
 8 summary judgment be **GRANTED IN PART**; Defendant's cross motion to affirm the ALJ decision
 9 be **DENIED** and this action be **REMANDED** for further administrative proceedings.

10 **II.**

11 **PROCEDURAL HISTORY**

12 On April 20, 2007, Plaintiff filed an application for Social Security Disability Insurance
 13 Benefits alleging disability on April 22, 2007. *See* Administrative Record ("AR") at 76. His
 14 application was denied initially and also on reconsideration. AR at 76. On February 7, 2008, a
 15 request for a hearing was timely filed. AR at 76. Plaintiff testified telephonically at a hearing held
 16 on October 2, 2009. *Id.* Plaintiff's attorney David Shore at the hearing and Vocational expert Mark
 17 Remas appeared at the hearing. *Id.* The ALJ submitted his decision on February 9, 2010, finding the
 18 claimant was not entitled to disability insurance benefits. AR at 81. On July 14, 2010, the Appeals
 19 Council vacated the February 9, 2010 decision and remanded Plaintiff's case to the ALJ for failure
 20 to provide Plaintiff with Exhibit 15F, a examination report of Plaintiff which was completed after the
 21 October 2, 2009 hearing. AR at 86. The Appeals Counsel also provided Plaintiff with the opportunity
 22 to attend a supplemental hearing, which was held on December 15, 2010. AR at 8. Following the
 23 supplemental hearing, the ALJ submitted his decision on December 21, 2010, finding again that the
 24 claimant was not entitled to disability insurance benefits. AR at 16. The decision of the Social
 25 Security Administration became final when the Appeals Council adopted the ALJ's findings in a
 26 decision dated February 22, 2011. AR at 1.

27 On April 20, 2011, Plaintiff filed the instant complaint pursuant to §405(g) of the Act in order
 28 to obtain judicial review of a "final decision" from the Commissioner of the Social Security

1 Administration (“Commissioner”) denying his claim for Disability Insurance Benefits [“DIB”].
 2 Defendant filed an answer to the complaint on September 12, 2011. [ECF Nos. 1, 9.]

3 On November 4, 2011, Plaintiff filed a motion for summary judgment. [ECF No. 12.] and
 4 Defendant filed a cross-motion for summary judgment (hereinafter “DM”) on December 23, 2011.
 5 [ECF No. 14.] Both motions were found suitable for decision without oral argument and taken under
 6 submission.

7 **III.**

8 **DISCUSSION**

9 **1. Legal Standard**

10 A claimant is entitled to disability benefits if, considering her age, education and work
 11 experience, she is unable to perform the work she previously performed and also the “inability to
 12 engage in any substantial gainful activity by reason of any medically determinable physical or mental
 13 impairment which can be expected to last for a continuous period of not less than 12 months...” 42
 14 U.S.C. § 423(d)(1)(A). The Act further provides that an individual:

15 shall be determined to be under a disability only if his physical or mental impairment
 16 or impairments are of such severity that he is not only unable to do his previous work
 17 but cannot, considering his age, education, and work experience, engage in any other
 kind of substantial gainful work which exists in the national economy, regardless of
 whether such work exists in the immediate area in which he lives, or whether a specific
 job vacancy exists for him, or whether he would be hired if he applied for work.

18 42 U.S.C. § 423(d)(2)(A).

19 The Secretary of the Social Security Administration has established a five-step sequential
 20 evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920.
 21 **Step one** determines whether the claimant is engaged in “substantial gainful activity.” If she is,
 22 disability benefits are denied. 20 C.F.R. §§ 404.1520(b), 416.920(b). If she is not, the decision maker
 23 proceeds to **step two**, which determines whether the claimant has a medically severe impairment or
 24 combination of impairments. That determination is governed by the “severity regulation” which
 25 provides in relevant part:

26 If you do not have any impairment or combination of impairments which significantly
 27 limits your physical or mental ability to do basic work activities, we will find that you
 28 do not have a severe impairment and are, therefore, not disabled. We will not consider
 your age, education, and work experience.

1 20 C.F.R. §§ 404.1520 c), 416.920 c).

2 The ability to do basic work activities is defined as “the abilities and aptitudes necessary to
 3 do most jobs.” 20 C.F.R. §§ 404.1521 (b), 416.921 (b). Such abilities and aptitudes include
 4 “[p]hysical functions such as walking, standing, sitting, lifting, pushing, pulling, reaching, carrying,
 5 or handling”; “[c]apacities for seeing, hearing, and speaking”; “[u]nderstanding, carrying out, and
 6 remembering simple instructions”; “[u]se of judgment”; “[r]esponding appropriately to supervision,
 7 co-workers, and usual work situations”; and “[d]ealing with changes in a routine work setting.” *Id.*

8
 9 If the claimant does not have a severe impairment or combination of impairments, the
 10 disability claim is denied. If the impairment is severe, the evaluation proceeds to the **third step**,
 11 which determines whether the impairment is equivalent to one of a number of listed impairments that
 12 the Secretary acknowledges are so severe as to preclude substantial gainful activity. 20 C.F.R. §§
 13 404.1520 (d), 416.920 (d); 20 C.F.R. Part 404, Appendix 1 to Subpart P. If the impairment meets or
 14 exceeds one of the listed impairments, the claimant is conclusively presumed to be disabled. If the
 15 impairment is not one that is conclusively presumed to be disabling, the evaluation proceeds to the
 16 **fourth step**, which determines whether the impairment prevents the claimant from performing work
 17 she has performed in the past. If the claimant is able to perform her previous work, she is not
 18 disabled. 20 C.F.R. §§ 404.1520 (e), 416.920 (e). If the claimant cannot perform her previous work,
 19 the **fifth and final step** of the process determines whether she is able to perform other work in the
 20 national economy in view of her age, education, and work experience. The claimant is entitled to
 21 disability benefits only if she is not able to perform other work. 20 C.F.R. §§ 404.1520 (f), 416.920
 22 (f).

23 Section 405(g) of the Act allows unsuccessful applicants to seek judicial review of a final
 24 agency decision of the Commissioner. 42 U.S.C. § 405(g). The scope of judicial review is limited.
 25 The Commissioner’s denial of benefits “will be disturbed only if it is not supported by substantial
 26 evidence or is based on legal error.” *Brawner v. Secretary of Health and Human Servs.*, 839 F.2d 432,
 27 433 (9th Cir. 1988) (citing *Green v. Heckler*, 803 F.2d 528, 529 (9th Cir. 1986)).

28 Substantial evidence means “more than a mere scintilla” but less than a preponderance.

1 *Sandgathe v. Chater*, 108 F.3d 978, 980 (9th Cir. 1997) (citation omitted). “[I]t is such relevant
 2 evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.* (quoting
 3 *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995)). The court must consider the record as a
 4 whole, weighing both the evidence that supports and detracts from the Commissioner’s conclusions.
 5 *Desrosiers v. Secretary of Health & Human Servs.*, 846 F.2d 573, 576 (9th Cir. 1988) (citing *Jones*
 6 *v. Heckler*, 760 F.2d 993, 995 (9th Cir. 1985)). If the evidence supports more than one rational
 7 interpretation, the court must uphold the ALJ’s decision. *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir.
 8 1984). When the evidence is inconclusive, “questions of credibility and resolution of conflicts in the
 9 testimony are functions solely of the Secretary.” *Sample v. Schweiker*, 694 F.2d 639, 642 (9th Cir.
 10 1982).

11 Even if the reviewing court finds substantial evidence supports the ALJ’s conclusions, the
 12 court must set aside the decision if the ALJ failed to apply the proper legal standards in weighing the
 13 evidence and reaching his or her decision. *See Benitez v. Califano*, 573 F.2d 653, 655 (9th Cir. 1978).
 14 Section 405(g) permits a court to enter a judgment affirming, modifying, or reversing the
 15 Commissioner’s decision. 42 U.S.C. § 405(g). The reviewing court may also remand the matter to
 16 the Social Security Administrator for further proceedings. *Id.*

17 **2. The ALJ’s Decision**

18 After weighing the evidence from the administrative record and listening to the testimony of
 19 Plaintiff and the experts, the ALJ determined Plaintiff retained the residual functional capacity to
 20 “only lift and carry 20 pounds occasionally and 10 pounds frequently and stand and walk up to 6 hours
 21 of an 8-hour workday and sit for 6 hours in an 8-hour workday.” [AR at 11] The ALJ also found
 22 Plaintiff “could climb, stop[sic], kneel and crouch only occasionally... perform gross manipulation
 23 using the right wrist only frequently and could handle only frequently with the right hand.” [AR at 11]

24 The ALJ found Plaintiff’s testimony regarding the intensity, persistence and effects of his pain
 25 was unsupported by the medical record. [AR at 12] The ALJ relied instead on the opinion of an
 26 examining physician, Dr. Thomas Sabourin, as well as the State Agency medical consultant in
 27 reaching his decision on residual functional capacity. [AR at 13-14] The ALJ limited the weight
 28 given to the opinion of Dr. Thomas Schweller because Dr. Schweller did not review additional

1 medical evidence which was provided to the ALJ after the evaluation. [AR at 14] The ALJ also
 2 assigned less than controlling weight to the opinion of treating physician, Dr. Ede, who opined
 3 Plaintiff would not be “able to work for a least one year” because the determination of Plaintiff’s
 4 disability is an issue reserved to the Commissioner. [AR 14]

5 The ALJ determined Plaintiff was able to perform past relevant work as an auto-self service
 6 station attendant. [AR at 15] However, because Plaintiff did not have the residual functional capacity
 7 to perform the full range of light work, the ALJ also made alternative findings for step five of the
 8 sequential evaluation process and determined Plaintiff was able to make an adjustment to other work
 9 in the economy, namely representative unskilled, light occupations such as furniture rental clerk, mail
 10 clerk and assembler. [AR at 15] Accordingly, the ALJ found Plaintiff was not disabled. [AR at 16]

11 **3. Plaintiff’s Contentions**

12 **A. Plaintiff claims the ALJ’s reasons for discrediting Plaintiff’s allegations of
 13 pain and limitation were unsupported by the record and legally insufficient.**

14 Plaintiff contends the ALJ’s conclusion that Plaintiff did not seek consistent care for his back
 15 pain is not supported by the record and provides a review of Plaintiff’s medical history from 2007 to
 16 2010. [ECF. No. 12 at pp. 9-12] Plaintiff also argues the ALJ’s finding that Plaintiff engages in home
 17 activities and other chores for family members does not discredit his testimony about the intensity of
 18 his disability because daily chores are not indicative of the capacity to complete sustained work
 19 activity during the day. *Id.* at 13.

20 Defendant argues the ALJ provided valid reasons supported by the record for finding Plaintiff’s
 21 testimony was not credible. [ECF No. 14 at p. 5] Defendant contends the ALJ found Plaintiff’s
 22 subjective claim of disabling symptoms was inconsistent with the objective medical evidence as well
 23 as Plaintiff’s daily activities. [ECF. No. 14 at p. 9] Defendant also argues the ALJ found Plaintiff’s
 24 testimony was inconsistent with the notes of his treating orthopedist, Dr. Mark Kruper. [ECF. No.
 25 14 at pp. 8-9] Consequently, Defendant urges the Court to affirm the ALJ’s credibility finding. [ECF.
 26 No. 14 at p. 9]

27 An ALJ must provide reasons for discounting a plaintiff’s testimony. *Stewart v. Sullivan*, 881
 28 F.2d 740, 743 (9th Cir. 1989). However, the ALJ cannot reject the claimant’s testimony solely on the

1 basis the testimony is not supported by objective medical evidence, but must use a combination of
 2 factors to make such a determination. *Bunnell v. Sullivan*, 947 F.2d 341 (9th Cir. 1991). When
 3 determining a plaintiff's credibility, the ALJ may consider the following: (1) claimant's reputation for
 4 truthfulness; (2) inconsistencies in either the claimant's testimony or between her testimony and her
 5 conduct; (3) claimant's daily activities; (4) claimant's work record; (5) testimony from doctors and
 6 other third parties concerning the nature, severity, and effect of the claimant's condition. *Thomas v.*
 7 *Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002). If an ALJ's credibility finding is supported by
 8 substantial evidence from the record, the court may not second guess such a finding. *Id.* at 959.

9 Further, the ALJ must present clear and convincing reasons explaining why he or she discredits
 10 a claimant's testimony, absent a finding of claimant malingering. *Carmickle v. Comm'r Soc. Sec.*
 11 *Admin.*, 533 F.3d 1155, 1160 (9th Cir. 2008); *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998).
 12 General findings are insufficient; the ALJ must point to specific non-credible testimony and specific
 13 undermining evidence. *Id.*

14 The Ninth Circuit has held ALJs can consider the plaintiff's daily activities when determining
 15 whether a plaintiff's pain allegations are valid. *Burch v. Barnhart*, 400 F.3d 676, 680 (9th Cir. 2005),
 16 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). If the claimant is able to perform daily functions
 17 "involv[ing] many of the same physical tasks as a particular type of job, it would not be farfetched for
 18 an ALJ to conclude the claimant's pain does not prevent the claimant from working." *Fair*, 885 F.2d
 19 at 603. However, the Ninth Circuit was quick to point out instances where some daily activities are
 20 not easily transferable to the workplace, such as merely performing minimal housework. *Id.*

21 In *Fair*, the Ninth Circuit affirmed the ALJ's denial of benefits. 885 F.2d at 604. The court
 22 ruled the claimant's testimony of severe, debilitating, and persistent pain did not match the following
 23 objective evidence: the claimant had minimal treatment by doctors and physical therapists; the
 24 claimant failed to comply with the treating physician's recommendations, and; the claimant remained
 25 fully capable of caring for his personal and household needs. *Id.*; *see also Thomas*, 278 F.3d at 959
 26 (affirming ALJ's findings discrediting claimant where no objective medical evidence existed to
 27 support claimant's description of pain and claimant engaged in various household chores and presented
 28 conflicting evidence of her activities to two different individuals); *Orteza v. Shalala*, 50 F.3d 748, 750

1 (9th Cir. 1995) (affirming ALJ's discrediting claimant where treating physician could not find
 2 objective medical support for claimant's pain testimony, the claimant performed many household
 3 chores--shopping, washing dishes, cooking, and visiting relatives--and the claimant was not taking
 4 prescription medication); *Burch*, 400 F.3d at 680 (affirming ALJ's finding discrediting claimant where
 5 objective medical evidence did not support claimant's testimony and claimant's daily activities
 6 included caring for herself and others, cooking, cleaning, shopping, and personal financial
 7 management).

8 Here, the ALJ found "the claimant's medically determinable impairments could reasonably
 9 be expected to cause the alleged symptoms." (AR at 12) However, the ALJ discredited Plaintiff's
 10 statements regarding his disabling limitations as to "intensity, persistence and limiting effects" for the
 11 following reasons:

12 (1) Plaintiff did not receive "the level of treatment to be expected for an individual that was
 13 totally disabled"; (2) Plaintiff's statement of disabling symptoms were "out of proportion with the
 14 medical record"; and 3) Plaintiff's testimony admitting certain abilities and daily activities. (AR at
 15 12)

16 **B. ANALYSIS - Plaintiff's Credibility**

17 There is no evidence in the administrative record to suggest malingering on Plaintiff's part.
 18 Accordingly, the ALJ was required to support his credibility finding with clear and convincing
 19 evidence. *Benton v. Barnhart*, 331 F.3d 1030, 1040 (9th Cir. 2003). As explained above, when
 20 determining a plaintiff's credibility, the ALJ may consider: (1) claimant's reputation for truthfulness;
 21 (2) inconsistencies in either the claimant's testimony or between her testimony and her conduct; (3)
 22 claimant's daily activities; (4) claimant's work record; (5) testimony from doctors and other third
 23 parties concerning the nature, severity, and effect of the claimant's condition. *Thomas v. Barnhart*,
 24 278 F.3d 947, 958-59 (9th Cir. 2002).

25 The ALJ found Plaintiff's statements concerning the intensity, persistence and effects of his
 26 impairments to be inconsistent with the medical record and opinion evidence. (AR at 12-14)
 27 Specifically, in rejecting Plaintiff's pain testimony, the ALJ noted an inconsistency existed between
 28 Plaintiff's statement that a doctor at UCSD advised him to refrain from surgery while the treatment

notes of Plaintiff's orthopedist, Dr. Kruper indicated Plaintiff "continues at this time to want to avoid surgical intervention." (AR at 488) In addition, the ALJ pointed to Plaintiff 's receipt of conservative treatments of injection and physical therapy in support of his findings discounting Plaintiff's disabling symptoms testimony.

5 The ALJ also considered Plaintiff's testimony that he could not work due to low back pain that
6 rated a 7-out-of-10 in terms of intensity, however he found it inconsistent with the treatment notes of:
7 (1) Plaintiff's orthopedist, Dr. Kruper, who opined that Plaintiff's symptoms were greatly improved
8 in 2007 in response to steroid injections; and (2) the notes of examining physician, Dr. Sabourin who
9 opined in 2009 that although there appeared to be "some pain with leg manipulation ... load tests were
10 negative [and] the claimant demonstrated normal motor strength throughout the upper and lower
11 extremities bilaterally." (AR at 13, 488, and 550- 554)

12 As for consideration of Plaintiff's daily activities, the ALJ indicated in his opinion that while
13 he heard testimony from Plaintiff that he has to lie or sit down for three-quarters of the day, there was
14 no medical documentation to support that assertion, and Plaintiff testified he assists his parents, with
15 whom he lives, with kitchen chores daily. (AR at 36) Plaintiff also testified at his first hearing that
16 from April of 2007² to the date of his incarceration in 2009, he drove his nieces to and from school
17 five days a week as well as babysat for his family members. (AR at 57-58)

18 After review of the administrative record, it is clear the evidence considered by the ALJ is
19 specifically identified in his decision, documented in the administrative record and properly falls into
20 three of the five categories³ for the ALJ's consideration as delineated by the Ninth Circuit in *Thomas*
21 *v. Barnhart*, 278 F.3d 947, 958-59 (9th Cir. 2002). The Court may not, therefore, second guess the
22 ALJ's credibility finding as to Plaintiff. *Id.* at 959; *see also Burch v. Barnhart*, 400 F.3d 676, 679 (9th
23 Cir. 2005)(explaining the Court will uphold the Commissioner's decision when the evidence is
24 susceptible to more than one rational interpretation.) Accordingly, **IT IS RECOMMENDED** the

²Plaintiff claims disability from April 22, 2007 to the date of the ALJ's decision. (AR 8)

27 ³When determining a plaintiff's credibility, the ALJ may consider: (1) claimant's reputation for
28 truthfulness; (2) inconsistencies in either the claimant's testimony or between her testimony and her conduct;
concerning the nature, severity, and effect of the claimant's condition. *Thomas v. Barnhart*, 278 F.3d 947, 958-
59 (9th Cir. 2002).

1 Court find the ALJ properly determined Plaintiff's credibility was impeached by inconsistencies with
 2 the record.

3

4 **C. Plaintiff claims the ALJ failed to adequately reject the opinion of Plaintiff's
 5 treating physician, Dr. Mark Kruper.**

6 Plaintiff contends the ALJ improperly rejected the opinion of treating physician Dr. Mark
 7 Kruper by failing to address in any way his diagnosis as to Plaintiff's limitations. [ECF. No. 12 at p.
 8 19] Plaintiff requests remand so that the ALJ may consider Dr. Kruper's opinion, which Plaintiff
 9 argues is consistent with the opinions of examining physician Dr. Schweller and treating physician
 10 Dr. Ede, both of whom the ALJ credited, but afforded less weight than the opinions of an examining
 11 physician and non-examining state agency medical consultant. *Id.*

12 Defendant argues the ALJ was justified in not addressing the opinion of Dr. Kruper because
 13 his opinion was incomplete and not particularly helpful to the ALJ's determination at step five of the
 14 evaluative process. [ECF. No. 14 at p.9] Defendant also suggests the ALJ implicitly relied on the
 15 opinion of Dr. Kruper when the ALJ rejected Plaintiff's disabling symptoms testimony and referenced
 16 Dr. Kruper's note indicating Plaintiff had the ability to improve with treatment as support for the
 17 credibility determination. *Id.* Finally, Defendant argues the ALJ's failure to explicitly address Dr.
 18 Kruper's opinion that Plaintiff should be limited to lifting 15 pounds is harmless because the "opinion
 19 is substantially consistent with the ALJ's RFC finding, which limits Plaintiff to lifting up to twenty
 20 pounds." *Id.*

21 The opinions of treating physicians are generally given greater weight than those of other
 22 physicians because of the treating physicians' intimate knowledge of the claimant's condition.
 23 *Aukland v. Massanari*, 257 F.3d 1033, 1037 (9th Cir. 2001). Further, in order to reject the opinion
 24 of a treating physician, the ALJ is required to show specific and legitimate reasons based on
 25 substantial evidence from the record. *Id.*; *see also Smolen v. Chater*, 80 F.3d 1273, 1285 (9th Cir.
 26 1996). If the opinion is uncontroverted, the ALJ must provide clear and convincing reasons for
 27 rejecting such testimony. *Connett v. Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003); *see also Smolen*,
 28 80 F.3d at 1285, *Rodriguez v. Bowen*, 876 F.2d 759, 762 (9th Cir. 1989). Where the report of a

1 treating physician is "brief and conclusionary in form with little in the way of medical findings to
 2 support the conclusion that appellant was totally disabled," the ALJ is proper in rejecting such
 3 information. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1195 n. 3 (9th Cir. 2004) (quoting
 4 *Young v. Heckler*, 803 F.2d 963, 968 (9th Cir. 1988)). However, where the ALJ fails to provide
 5 adequate reasons for rejecting the treating physician's opinion, the court will credit the treating
 6 physician's opinion as a matter of law. *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995).

7 **D. ANALYSIS - Weight of Treating Physician's Opinion⁴**

8 As explained above, in order to reject the opinion of a treating physician, the ALJ is required
 9 to show specific and legitimate reasons based on substantial evidence from the record. Here, the ALJ
 10 determined Plaintiff retained the residual functional capacity to "lift and carry 20 pounds occasionally
 11 and 10 pounds frequently" (AR at 11), but did not address the opinion of treating physician Mark
 12 Kruper, or explain what, if any weight, was afforded to it in light of the record as a whole. The Court
 13 notes that while Dr. Kruper's opinion is not in a format that easily translates into a Residual
 14 Functional Capacity assessment, the ALJ must still address why he gave no apparent weight to Dr.
 15 Kruper's opinion that Plaintiff should be limited to lifting "no more than 15 pounds" (AR 488),
 16 especially when examining physician Dr. Schweller, to whose opinion the ALJ gave moderate weight,
 17 found Plaintiff should be restricted to lifting 10 pounds occasionally. (AR 500)

18 When the Commission improperly rejects an examining physician's opinion, the court will
 19 credit the treating physician's opinion as a matter of law. *Lester*, 81 F.3d at 834. Accordingly, Dr.
 20 Kruper's opinion must be credited. It is within the Court's discretion to decide whether to reverse and
 21 remand for further administrative proceedings or to reverse and award benefits. *McAlister v. Sullivan*,
 22 888 F.2d 599, 603 (9th Cir. 1989).

23 Remand is appropriate here where additional proceedings would remedy defects in the ALJ's
 24 decision, and where the record should be developed more fully. *Marcia v. Sullivan*, 900 F.2d 172, 176
 25 (9th Cir. 1990). In the instant case, **the Court RECOMMENDS remand** not only because the ALJ

27 ⁴Title II distinguishes among the opinions of certain physicians and assigns less weight to those doctors
 28 that do not treat or examine the claimant at issue: "(1) those who treat the claimant (treating physicians); (2)
 those who examine but do not treat the claimant (examining physicians); and (3) those who neither examine
 nor treat the claimant (nonexamining physicians)." *Lester*, 81 F.3d at 830.

1 erred in failing to consider the opinion of treating physician Mark Kruper in developing Plaintiff's
 2 RFC, but because the ALJ's determination at Step Four of the evaluative process was flawed. Plaintiff
 3 asserts, and Defendant concedes, that the ALJ incorrectly determined that Plaintiff's past work as a
 4 gas station attendant qualified as substantial gainful activity ("SGA") at Step Four. (See Defendant's
 5 Motion, ECF No. 14 at 12:14-20 ("In 2003 and 2004, SGA-level work equaled \$800 and \$810 per
 6 month, respectively....Accordingly, Plaintiff's average monthly income in 2003 and 2004 was \$758.40
 7 and \$742.24 per month, respectively, *which is just below the presumptive level of SGA for 2003 and*
 8 *2004.*")(italics added). Nevertheless, Defendant argues remand is unnecessary because the ALJ's
 9 error at Step Four is harmless in light of the ALJ's alternate finding at Step Five. In the alternate
 10 finding, the ALJ determined that in addition to performing past work as a gas station attendant,
 11 Plaintiff was able to perform the requirements of representative unskilled, light occupations such as
 12 furniture rental clerk, mail clerk and assembler. (AR 15-16)

13 The Court disagrees with Defendant's harmlessness assessment. The ALJ's alternate finding
 14 at Step Five was based on an RFC that was formed without properly crediting the opinion of treating
 15 physician, Dr. Kruper, and therefore assumed a limitation of the ability to lift 20 pounds frequently.
 16 (AR 40-44) The Court has already indicated it was error for the ALJ to: (1) reject Dr. Kruper's
 17 opinion without providing specific reasons, and (2) consequently assign a less restrictive limitation
 18 than that found by Plaintiff's treating and examining physicians. **IT IS THEREFORE**
 19 **RECOMMENDED** the Court **REVERSE and REMAND** this matter for further administrative
 20 proceedings to determine the effect of Dr. Kruper's opinion on Plaintiff's Residual Functional
 21 Capacity and Plaintiff's ability to perform past work or any other work.

22 **IV.**

23 **CONCLUSION AND RECOMMENDATION**

24 For the reasons explained above, **IT IS HEREBY RECOMMENDED** the Court **GRANT**
 25 **IN PART** Plaintiff's motion for summary judgment, **DENY** the Commissioner's cross-motion for
 26 summary judgment and **REMAND** this action for further administrative proceedings.

27 ///

28 ///

1 **IT IS ORDERED** that no later than February 1, 2012, any party to this action may file
2 written objections with the Court and serve a copy on all parties. The document should be captioned
3 "Objections to Report and Recommendation."

4 **IT IS FURTHER ORDERED** that any reply to the objections shall be filed with the court
5 and served on all parties no later than February 15, 2012. The parties are advised that failure to file
6 objections within the specified time may result in waiver of the right to raise those objections on
7 appeal of the Court's order. See Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); see also
8 Martinez v. Ylst, 951 F.2d 1153, 1156 (9th Cir. 1991).

9 **IT IS SO ORDERED.**

10 DATED: January 17, 2012


Hon. William McCurine, Jr.
U.S. Magistrate Judge, U.S. District Court

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